No. 13259.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WOODARD LABORATORIES, INC., DEAN D. MURPHY and JOHN L. SULLIVAN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

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I.

There Is No Substantial Evidence in the Record Consistent With Any Hypothesis but That of Innocence.

On page 17 of Appellee's Brief (and several times elsewhere in that brief), it is asserted that the evidence relied on by the Government was direct evidence, as distinguished from circumstantial evidence, and that therefore the rule announced on page 22 of Appellants' Opening Brief does not apply. (This rule in substance is that where all of the substantial evidence is as consistent with a reasonable hypothesis of innocence as with guilt, it is the duty of the appellate court to reverse the judgment.) This rule, it is said, applies only where the evidence relied upon for conviction is circumstantial rather than

direct. We believe that limitation upon the use of the rule to be correct. The evidence relied upon for conviction, however, was not direct, but circumstantial evidence.

Without quoting from the multitude of cases defining the difference between those two classes of evidence, it is sufficient to state that "Direct evidence is that which immediately points to the question at issue" whereas "* * * 'circumstantial' evidence is that which tends to establish the issue only by proof of facts sustaining by their consistency the hypothesis claimed, and from which the jury may infer the fact." (*United States v. Greene* (D. C. Ga. 1906), 146 Fed. 789, 824.)

To the same effect see:

Radomsky v. United States (C. A. 9, 1950), 180 F. 2d 781, 783;

United States v. Stoehr (D. C. Pa. 1951), 100 Fed. Supp. 143, 163;

Rumely v. United States (C. C. A. 2d 1923), 293 Fed. 532, 551;

Jones' Commentaries on Evidence, Vol. I, Sec. 6(5), p. 29.

The evidence of the Government offered in support of the charges may be boiled down to the following:

1. That the Government witnesses conducted assays by several methods, of samples of the products involved and *recovered* and *extracted* substantially less than the labeled potency of 22 mcgs. per tablet.

2. That by previous experiments and the experience of these witnesses, in their opinion the amount recovered was the total amount of estradiol present in the tablets.

3. That estradiol is a stable product and does not lose its potency by the lapse of time.

That evidence was simply evidence of circumstances from which the Government sought to induce the court to infer that therefore, *at the time of shipment,* these products did not contain the labeled potency of 22 mcgs. per tablet. This was not direct evidence "which immediately (pointed) to the question at issue." It was simply evidence composed of facts which gave rise to the inference "as to the existence of the fact in issue"—that the products at the time of shipment did not contain their labeled potency. (*United States v. Greene, supra.*)

On the other hand, the defense evidence was directed to the following:

1. That an amount of estradiol plus a 5% overage was placed in the manufacturing batches sufficient to produce a tablet containing 22 mcgs. of estradiol, as evidenced by the testimony of Mr. Galindo and corroborated by the work sheets [Exs. B, C and D]. This, on the other hand, was direct evidence, for it went directly to the precise point in issue—that at the time of shipment the tablets each contained 22 mcgs. The potency at the time of manufacture would also be the potency at the time of shipment because of the conceded fact that estradiol is a stable product and does not lose its potency. The Government on page 9 of its brief claims that the accuracy of the work sheets was so impeached as to render them useless for evidentiary purposes. We shall deal with this phase shortly.

2. That by assays of samples of some of the products, conducted by reputable laboratories, no more estradiol

could be *recovered* and *extracted* than an amount substantially less than the labeled potency.

3. That in the opinion of Dr. Jeffreys it was doubtful whether, under the U. S. P. method of assay, all of the extradiol could be *extracted* in the extraction stage of the assay by reason of the *excipients present in these tablets in combination with the infinitesimal amount of estradiol also present.*

4. That in order to demonstrate that the U. S. P. method of assay was not suitable or accurate for the assay of these tablets with the excipients composing them in combination with such an infinitesimal amount of estradiol present—that all of the estradiol *could not be extracted* by the U. S. P. method—experiments were conducted first with placebo or blank tablets containing no estradiol, into which approximately 22 mcgs. of estradiol was placed by those conducting the experiment, and then with tablets composed identically with those in question with the estradiol already present, and that in such experiment it was impossible to *recover* or *extract* the full amount of estradiol (approximately 22 mcgs.) placed in the mix by the persons conducting the experiment.

Throughout Appellee's Brief great stress is laid upon the experience of the Government witnesses. We do not question their experience or their proficiency. Nor can the qualifications of Drs. Jeffreys, Hoyt and Sobel be questioned. Great stress is also laid upon the several assay methods employed by those witnesses, with the end result that the amount of estradiol *measured* by the several methods employed showed substantially less than the labeled potency. We do not question the accuracy

of the *measuring* process. *The crucial point is that of extraction.* The evidence of the Government witnesses amounted to no more than that they extracted so much estradiol, which was substantially less than the labeled potency. We are in complete agreement with the fact that they did not extract any more than they said they did. Neither did the defense witnesses, and in order to show that no more was extractable from a tablet such as this, containing these excipients in combination with such a minute quantity of estradiol, the experiment of Drs. Hoyt and Sobel was conducted, which conclusively proved that substantially less than the labeled potency was not extractable in the assay procedure.

The foregoing constitutes in reality the substantial evidence in this case upon which these judgments must stand or fall. When this evidence is thus appraised, it simply amounts to evidence by the Government that its experts could not *recover* or *extract* more than substantially less than the labeled potency, and that *in their opinion* they had recovered all of the estradiol present. The substantial evidence on the part of the appellants agreed that with tablets such as these, containing the excipients that they did in combination with such a minute quantity of estradiol, the full amount of extradiol present could not be extracted, but that more than the labeled potency was placed in the tablets at the time of manufacture, and, as shown by the experiments of Drs. Hoyt and Sobel, the full amount of 22 mcgs. of estradiol could not be *extracted* under the U. S. P. method and therefore could not be *measured.*

Certainly when thus appraised, it can hardly be said that all of the substantial evidence in this case is consistent only with a reasonable hypothesis of guilt and

is inconsistent with a reasonable hypothesis of innocence. The direct testimony of Mr. Galindo, corroborated completely by the work sheets [Exs. B, C and D], conclusively proves without contradiction that the amount of estradiol claimed to be present was actually present.

II.
Miscellaneous Points.

In an effort to justify the conclusion of the trial court that these products at the time of shipment were below their labeled potency, the Government levels its guns at portions of the defense evidence in an effort to show that it was impeached or otherwise shown to be of no evidentiary value.

1. First it is argued on page 9 of Appellee's Brief that upon cross-examination of Mr. Galindo it was shown that the work sheets were subject to so many errors as to render them incredible of belief.

(a) It is said that in a number of instances the work sheets did not bear any initials showing who performed the operations. A reference to the exhibits will show that the only instances in which the initials were omitted of the individual performing some phase of the operation had to do solely with weight before granulating, weight before tableting or weight after tableting. These operations had absolutely nothing to do with the placing of the materials in the mix and seeing to it that the manufacturing process was properly completed to its final conclusion. In fact, it will be noted that under the column "Raw Materials" of each work sheet, where the ingredients and their respective quantities are listed, the initial appears of each individual who performed that operation. The weight before tableting and after tableting, of which

so much is made in Appellee's Brief, was simply information desired by the laboratory conducting the manufacture for its own information on the cost phase of the operations and had absolutely nothing to do with whether the materials called for on each work sheet in the respective quantities also called for were actually placed in the batch. As to that phase of the operations, each work sheet bears the initials of the individual who performed that operation.

(b) It is said on page 9 of the Appellee's Brief that Mr. Galindo had stated that there was always a manufacturing loss in the tableting process, but was compelled to admit that the work sheets [Exs. F and G] showed no such loss and for that reason the work sheets were of no value in showing what and how much actually went into the batch. It is true that neither of those work sheets showed a loss of weight after tableting and that Mr. Galindo stated that there was always a slight loss in weight during the tableting process. As we have said, however, he pointed out that the only purpose of that information was to provide cost information to the laboratory and to enable the laboratory to approximately compute the number of tablets finally manufactured [R. 140, 149]. Certainly this immaterial discrepancy, if it is one, on a phase having absolutely nothing to do with what and how much went into the manufacturing batch could hardly be said to impeach the accuracy of the entries as to what and how much actually did go into the batch, and which entries show, so far as estradiol is concerned, an overage of 5% more than necessary to produce a tablet containing 22 mcgs. of estradiol.

(c) It is next said that Exhibit G shows a gain in the weight between granulating and tableting and that

Mr. Galindo surmised that this was an error. We accept the statement that it was an error, but it has to do with the information desired by the laboratory for its cost information, entirely aside from the entries on the work sheet showing what and how much went into the batches. With respect to the foregoing attacks on these work sheets, we emphasize that not one word of testimony in this case remotely approaches the impeachment of any of the entries having to do with what and how much went into the manufacturing batches, and that inconsistencies or errors, if you please, such as they are, found in these work sheets, are matters that cannot possibly affect the credibility and authenticity of these documents for the purpose for which they were offered.

(d) It is next said that Mr. Galindo could not explain why Exhibit H did not show the weight after tableting, this being one of the batches prepared for Dr. Hoyt's experiment. As testified to by Mr. Galindo [R. 137-139], this work sheet was made up for the manufacture of these two experimental batches, each to contain 7,000 tablets [R. 127-129]. This work sheet was made up for the purpose of producing a tablet identical with the ones in question. Considering the fact that the information as to weight before tableting and after tableting, etc., was for the purpose of providing cost information to the laboratory and had nothing at all to do with what and how much went into the batch, it is ridiculous to argue that the absence of such information on Exhibit H impeaches in any fashion the accuracy of this sheet. Such information under no stretch of the imagination would be needed. All these people were doing was manufacturing a batch for these experiments and mak-

ing sure that what the work sheet called for went into the batch. Then it is argued that Exhibit H is entitled to no weight because it represents 7,000 tablets to be made, whereas 14,000 were made. This indeed is a fatuous argument. The testimony of Mr. Galindo [R. 127-129] shows that two batches of 7,000 tablets each were made from this work sheet. One batch contained the estradiol and the other contained everything except the estradiol. Considering the purpose for which these tablets were being made, it would have been a foolish waste of time to make up two work sheets, each identical in every respect except for the requirement on one that estradiol be placed in the batch. It should be kept in mind that the ones who were manufacturing these two batches for the experiments were not the employees in the plant, but the top officials of the company, and there was no need to make any but one work sheet and then simply to eliminate the estradiol from the batch in which it was not supposed to be used.

(e) Lastly it is said that Mr. Galindo admitted that something was lost in the manufacturing process, but did not know whether it was estradiol. This argument entirely ignores the *undisputed* testimony summarized on pages 6 and 7 of the Appendix to Appellants' Brief and found in the Record on pages 113, 114, 140, 141, 149 and 150. This testimony was simply that *the estradiol itself could not possibly be lost* because at the outset it is placed in the mixing machine with the powdered ingredients and mixed into one wet homogeneous mass —wet with the estradiol—and mixed completely. The manufacturing loss that occurs is in the tableting process, lost from the dies, and whatever is lost, which is natural in the process, is a loss of the mass itself, which simply

reduces the quantity of the mass finally tableted, it being impossible for the loss to be of estradiol itself. In other words, when a work sheet shows a loss of 4 ounces, it does not and cannot mean a loss of estradiol, but a loss of 4 ounces of the entire mass [R. 140, 141, 147-152].

Under the foregoing analysis it is plain from the direct evidence of the appellants that the quantities of the various materials called for by the work sheets in evidence actually were put into the batches which resulted in a tablet each containing 22 mcgs. plus of estradiol.

2. Several times in Appellee's Brief it is emphasized that Drs. Hoyt, Sobel and Jeffreys conducted their first assay of estradiol in preparation for this case; that the Government witnesses had vast experience in such assays and therefore "if the lower court had disregarded (the testimony of the defendants' witnesses mentioned), it would have exercised a sound judicial discretion" (Appellee's Br. p. 27). Experience in the conduct of assays prescribed in U. S. P. can have no bearing upon the credibility of the expert who is testifying when one considers that each of these three defense witnesses possesses a Ph. D. degree coupled with a wealth of experience in analytical procedures. If experience in the conduct of U. S. P. assays were a necessary qualification, then little, if any, value would there be in prescribing a U. S. P. method. A U. S. P. method is prescribed when it is found to be practicable and one which will "lead to fairly uniform results when applied by different analysts" (U. S. P. XIV, subdiv. 10, p.

xxx). In fact, Mr. Carol on cross-examination stated that a competent chemist (much less a "Ph. D.") should be able to use a U. S. P. method of assay and it would not require that he have experience with a hundred or a thousand assays in order to run it [R. 292], and that the method of assay in question was the best possible they knew of for estradiol and could be used with relatively simple equipment [R. 293].

3. It is also argued that the appellants did not procure assays of these tablets prior to their shipment or until after notice from the Government that samples had been found to be below labeled strength, and that the extraction process had been known for 50 years. The extraction of excipients from a material to be measured concededly has been known to analytical chemistry for many, many years. Whether a particular extraction procedure commonly used is suitable to a certain product, however, is another question. Dr. Jeffreys refused to perform an assay of samples of these products in July of 1950 because he knew of no suitable method to assay a tablet such as this containing such a very small amount of estradiol, and it was not until the U. S. P. method became known that he consented to conduct such an assay. Other assays were made by other laboratories retained by appellants, with a wide variety of results—so wide, in fact, that they were meaningless. [See Ex. 2, letter Dec. 5, 1950.) But the fact remains, and there is not a word in the record to dispute it, that no published method for the assay of estradiol *tablets* of this charac-

ter—which provided an accurate *extraction* method—appeared prior to the U. S. P. method.*

4. Criticism is made on page 13 of Appellee's Brief that Dr. Hoyt did not use the so-called U. S. P. Reference Standard estradiol for the conduct of his experiment. The Reference Standard provides that the estradiol shall have a melting point and an optical rotation within the range testified to by the defense witness Harry Rosenzweig [R. 78 *et seq.*]. Dr. Hoyt stated that he used a product labeled "Estradiol U. S. P.," labeled to be in conformity with the U. S. P. [R. 239] and obtained from a pharmaceutical supply house other than any involved in this case. He checked that so obtained against estradiol obtained from Dr. Clare E. Zagel at the University of California and found them to compare [R. 251 and 252]. The description of U. S. P. Estradiol is given in the Monograph, page 225 of Volume XIV, U. S. P. When found to compare with the requirements for U. S. P. estradiol, obviously that was all that was necessary to render it suitable for use.

5. Reference is also made on page 15 of Appellee's Brief to the fact that appellants introduced the deposition of Elizabeth Adam Weiss. This deposition had not

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*Mr. Carol could only state generally that the principles of extraction had been known for many years. He did not refer to one method of *extraction* for an estradiol tablet of this character that had been published or otherwise known. He did enumerate several methods of *measuring* the amount of estradiol *after* extraction [R. 39-41]. It is conceded that there existed many methods for thus measuring the amount of estradiol, but, as all witnesses conceded, that presented no problem. It was the *extraction* of the estradiol that presented the problem, and these outstanding scientists possessing Ph.D. degrees, who testified for the defense, flatly stated that no extraction procedure for the assay of an estradiol *tablet* appeared prior to the U.S.P. method.

been introduced before for the reason that counsel for appellants felt her conclusions inaccurate. (See Appellants' Op. Br. p. 11.) It was only after the court stated that it was impressed with the fact that appellants had introduced no evidence to show the amount of estradiol in the tablets involved that counsel for appellants asked to re-open the case and supply that information to the court, even though he believed it unreliable.

Space does not permit us to answer in any more detail the arguments advanced in Appellee's Brief. We believe, however, that they have been sufficiently covered in Appellants' Opening Brief and what has been said in this Reply Brief, and it is therefore submitted that the evidence here falls far, far short of being "only * * * consistent with guilt, * * * (and) inconsistent with every reasonable hypothesis of innocence." No matter how searching an analysis is made of this record, it simply cannot be said that the evidence in this case points "so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis but that of guilt." (*Karn v. United States* (C. C. A. 9, 1946), 158 F. 2d 568, 570.)

The judgments should therefore be reversed.

Respectfully submitted,

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